would be sufficient to override the necessity for obtaining the certificate. . ."

In the instant case, there is not a scrap of evidence of any act on the part of the defendants to show that they had obstructed or intermeddled in any way in the matter of the fourth interim certificate. The only evidence of any act on the part of the defendants is their letter of the 25th July 1969 in reply to plaintiffs' solicitor's letter of the 22nd July 1969 which says:

"We refer to your JCCT/56/69 of 22nd July and are surprised at the contents as so far as we can see our Consulting Engineers have certified payment in accordance with the agreement. I suggest that before you decide to take the action referred to in your last paragraph which incidentally does not appear to be in accordance with our agreement, that your clients submit their 5th progress claim to our Consulting Engineers which will appear to me to be next action he should take."

It would be a misuse of language, to use the words of Lord Radcliffe in the case of *R.B. Burden Ltd.* v. *Swansea Corporation*,(2) to say this letter of the defendants constitutes an interference or obstruction of the issue of the certificate. In my view, all the defendants did was to point out that they had left the matter of the certificate to the engineers alone and that was according to the contract. They suggested that the plaintiffs could make a further progressive claim.

Interim certificates can only be an approximate valuation of the work done, and any errors in them are subject to adjustment when the final certificate is issued.

In the above case the defendant corporation had, at the request of the architect, appointed a surveyor to make valuations in connection with a building contract. The contractors had applied for an interim payment of £5785. The surveyor recommended £1287. The valuation which was not properly made, the surveyor declined to change. The contractors determined the contract on the ground that the action of the surveyor amounted to interference or obstruction by the defendants of the issue of a certificate. Lord Tucker said —

". . .Nor do I think that the conduct found against Mr. Hawkins (the surveyor) obstructed the issue of a certificate; it may have resulted in the issue of a certificate for a smaller sum than that which was due, but that is, in my view, a matter for arbitration. . . ."

In the instant case, the contract provides for arbitration.

The learned judge found that there was no fraud or collusion between the defendants and the engineers; the defendants did not interfere or obstruct the engineers in issuing the fourth interim certificate nor had they given instructions which impeded the engineers in the issue of such certificate.

On the evidence there is no other finding that he could have arrived at. The plaintiffs had failed to show that they could proceed in the action without a certificate.

The appeal is dismissed with costs.

Azmi L.P. and **Ali F.J.** concurred.

Appeal dismissed.

GUAN SOON TIN MINING CO. v. AMPANG ESTATE LTD.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)

September 11, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1972]

Land Laws — Right of support — Land in its natural state, by the adjacent land — National Land Code, s. 44(1)(b).

Mining — Adjacent land — Damage to neighbour's property — Mining Enactment (Cap. 147), ss. 16(vi) & 134.

Common law principles apply to claims for disturbance of the right to support. When a subsidence occurs to a neighbour's land, he who causes the subsidence is liable in damages. Where there is a lapse of time between the excavation of land and the occurrence of the resulting subsidence and during the interval a change has taken place in the ownership or occupation of the land, the new occupier is under no liability.

This was an appeal from the decision of the High Court ([1972] 1 M.L.J. 131). The respondent were owners of certain lands which they have developed as a housing estate. The appellants were miners holding a lease over land lying south of the respondents' property. A minor landslide occurred on the appellants' land on December 29, 1966 due to heavy rain and caused damage to the respondents' property. A further slip occurred in February 1967 and others subsequently. The respondent issued a writ on May 21, 1968 for damages claiming the sum of $501,991.29 for the damage caused to their property.

In the court below the question for determination was whether the appellants were under a legal obligation to support the respondents' land according to common law principles which have been given statutory recognition by section 44(1)(b) of the National Land Code and various provisions of the Mining Enactment, especially sections 16(vi) and 134; and if they were, whether the presence of a concrete drain on the respondents' land disentitled them to this right of support.

The respondents sought to prove (i) that the appellants carried on mining on the adjacent land, and (ii) that "by reason of such working" the appellants had suffered damage to this property.

The appellants did not dispute the damage, but they denied liability therefor. The trial judge found them liable.

Held, allowing the appeal: it was proved that, adjoining the respondents' land at its southern boundary, other miners had worked this mining land for many years. The land had already been excavated previously when the appellants entered into occupation. There was no evidence that the appellants enlarged or deepened this hole or committed any other act which would make them liable for withdrawal of support from the respondent's land.

Cases referred to:-

(1) *Torette House Pty. Ltd.* v. *Berkman* 62 C.L.R. 637, 658.

(2) *Lamb* v. *Walker* L.R. 3 Q.B.D. 389, 400.

(3) *Backhouse* v. *Bonomi* 9 H.L.C. 503.

(4) *Greenwell* v. *Low Beechburn Coal Co.* [1897] 2 Q.B. 165.

(5) *Hall* v. *Duke of Norfolk* [1900] 2 Ch. 493.

(6) *Byrne* v. *Judd* (1908) 27 N.Z.L.R. 1106.

(7) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 93.

(8) *Gray* v. *Lord Ashburton* [1917] A.C. 26.

FEDERAL COURT.

Edgar Joseph Jr. for the appellants.

S.D.K. Peddie for the respondents.

Ong C.J. (Malaya): The respondents are the owners of certain lands situate off Jalan Ampang, Kuala Lumpur, which they have developed as a housing estate. The appellants were miners holding a lease over some 25 acres of land lying south of the respondents' property.

They were issued their first hydraulic licence to work this land in November 1964.

On December 29, 1966 "a minor landslide" was reported to the Mines Department by the appellants as having occurred "due to the recent heavy rain". They further stated that they were in the course of doing work to restore the land affected to its natural state. On January 24, 1967 Enche Redzuan, the then Deputy Senior Inspector of Mines, visited the mine and observed such work being done filling in the slip. On February 22, 1967 he wrote to the respondents' solicitors stating that "the damage was caused by a slip of ground on a mine face which had been left unworked for some time. The slip was brought about by wet weather...". It was alleged by the respondents that a further slip occurred in February 1967 and others subsequently, of which no precise dates or particulars were to be found on the record.

On May 21, 1968 the respondents issued writ in an action for damages claiming from the appellants the sum of $501,991.29, made up as follows: —

Expenses paid for repair to drains damaged ...	$ 22,307.85
Expenses estimated to be paid for current repairs to drains damaged	5,000.00
Earthworks	800.00
Repairs to road blocks damaged	400.00
Loss in value of land estimated at loss of $2/- per sq. ft. Total land affected is 186,741.72 sq. ft.	373,483.44
Estimate filling earth on road reserve	100,000.00
Total	$501,991.29

In their statement of claim the cause of action was set out in paragraphs 4 and 6 as follows: —

"4. The defendant firm its partners, servants or agents in or about and from September, 1966 to the date hereof *have worked* and gotten mines and minerals within and under *the said adjacent lands and have thereby withdrawn support* from the said lands of the plaintiff company which said lands have in consequence been damaged.

6. The plaintiff company says that the right to work the said adjacent mines and minerals is conferred by the mining title or titles under the Mining Enactment (Cap. 147) and is subject to the conditions that the defendant firm its partners, servants or agents or other the persons working the said Guan Soon Tin Mine and minerals should pay compensation for all *such damages as might be caused by reason of such working* to the owners and occupiers of the surface thereover or adjacent thereto. *The defendant firm* its partners servants or agents have *committed the damage and injury aforesaid* in the exercise of that right to work or otherwise but refuse to make compensation to the plaintiff company in respect thereof."

By their defence the appellants denied that their mining operations interfered at any time with the respondents' right of support, if any; they contended that the statement of claim disclosed no cause of action and stated that their mining operations were carried out in a reasonable and proper manner and with due care and skill. By a subsequent amended defence the appellants added a further denial that the respondents were entitled to the right of support alleged in their statement of claim and pleaded that the alleged damage was caused or substantially contributed to by the negligence of the respondents or their own servants and agents — of which particulars were given.

No reply was filed to the defence or amended defence. Therefore, when the trial of the action opened in the High Court, the issues before the court were as follows. The case for the respondents, as plaintiffs, was that, for their own land in its natural state, there was a right to support by adjacent land — according to common law principles which have been given statutory recognition by section 44(1)(b) of the National Land Code and various provisions of the Mining Enactment, especially sections 16(vi) and 134. This, of course, was essentially a question of law — and clearly so understood by counsel for the respondents whose written submission, *after evidence* had been given on both sides, was as follows: —

"Since this submission is to be confined to the law applicable, the facts of the case are, for purposes of this submission, *assumed* as having been found in favour of the plaintiff. *If it should be found that no damage was caused* to the plaintiff's land *OR if it should be found that the damage was not caused by acts of the defendants but by some other means then the plaintiff's claim must fail.*

Assuming therefore:-

(1) that the plaintiff's land has been damaged or injuriously affected by reason of slips of land which have occurred from time to time along the southern boundary;

(2) that the slips of land have been caused by reason of the defendants having worked too close to the common boundary and/or by reason of their having failed to maintain a sufficient degree of slope at the face of their workings and/or by reason of their having introduced into the plaintiff's drainage system surface water and effluent from the mine workings;

(3) that the result of the defendants' activities has been to withdraw from the plaintiff's lands the natural support the plaintiff's lands had previously enjoyed;

the first point of law to be considered is the nature and extent of the right of support enjoyed by a landowner in Malaysia."

Such being their view of the law, the respondents were content simply to adduce proof of damage as sufficient *per se* to establish the appellants' liability. The fact of damage, of course, was not disputed by the appellants — what they denied was legal liability therefor. The statement of claim made no allegations of negligence or breach of statutory duty on the part of the appellants, as being the true or effective cause of the damage. In other words, upon proof of damage, the appellants' liability was an inevitable consequence: *res ipsa loquitur*. It has been contended before us that the onus was on the appellants, as miners, to show, if they could, that the landslide was not due to their own mining operations.

Having regard to the pleadings, the learned trial judge — in my view quite rightly — said in his judgment: —

"I do not think I should concern myself with the allegation of the defendants' failure to maintain slope at the phase of their workings or their having introduced into the plaintiffs' drainage system surface water and effluent from the mine workings, since they were not pleaded by the plaintiffs. I shall, however, determine *whether the subsidence was caused by the mining operations carried out by the defendants* and *whether it was such acts that resulted in the withdrawal of support* of the plaintiff's lands."

After examining the evidence he came to the following conclusions: —

"On the facts available, it is, I think, clearly established that the defendants *not only carried out mining operations* on their land adjacent to the plaintiff's land *before the slip*

occurred, but they continued to do so despite the prohibition order issued by the Mines Department. I am satisfied that the subsidence was *solely caused by the mining operations* carried out by the defendants resulting thereby in the withdrawal of support of the plaintiffs' land."

If I understand the judge rightly, the mere fact that the appellants were working their mine was, in itself, sufficient to saddle them with liability. What in fact caused the subsidence there was no need to pause and consider. This, I think, is a fair interpretation of the above passage, for nowhere in the judgment can be found any specific finding of fact as to the cause of the slip. Thus it would appear that the judge fully accepted the thesis asserted in the statement of claim, *res ipsa loquitur*. Examination of the evidence adduced by the respondents, as I shall do later, will confirm this view.

The judge then continued: —

"Having reached that conclusion, the necessary question that arises is whether the plaintiffs acquired that right to support from the adjacent land. Before dealing with the law, I wish to make it absolutely clear that I shall not concern myself with the plaintiffs' allegation of breach by the defendants of the Mining Enactment or the terms of the licence. These allegations are not disclosed by the pleadings. I shall only confine myself to the only issue in this case, namely, *whether the defendants*, as owners of land adjoining that of the plaintiffs' and upon which the defendants were licensed to carry out mining operations, *were under a legal obligation to support the plaintiffs' land*, and, if they were, *whether the presence of the drain on the plaintiffs' land disentitled the plaintiffs to this right of support*."

The last sentence in the passage above is, in my opinion, of the utmost significance to the proper determination of this appeal. There was only one material fact considered in determining the issue: whether the construction of the drain affected the respondents' right to support of their land in its natural state by the adjacent land. What was overlooked all round was the undisputed fact, clearly in evidence, that the mine-hole had been excavated by the appellants' predecessors — not made by the appellants themselves. In my opinion, unless this vital fact was taken into account it could not properly be decided, in fact as well as in law, whether the appellants should be held liable.

It would appear to have been assumed, as the basis of the respondents' case, that the whole 25 acres of mining land was level in its natural state, affording lateral support to the respondents' adjoining property when the appellants entered into occupation of their mine. The respondents' case was presented and argued throughout on that hypothesis, and that hypothesis only, to account for the cave-in into the mine-hole. The trial judge's mind was therefore never rid of the false impression that the appellants' land, in its original state, was in fact providing support for the respondents' property and that the appellants' mining operations were the sole reason for the loss of such support. I think it evident from his judgment that what turned the scales in the respondents' favour was the answer given by Enche Redzuan, in cross-examination by counsel for the respondents, that "if it were not for the mining-hole, there would not have been a slip." This fact is, of course, axiomatic. There could not have been any slip if there had been no hole for the earth to fall into. But, as Enche Redzuan testified, "There was a mine-hole *before* the defendants began operations". Ample corroboration of this fact was provided by Madam Loh Ah Moy, a director of the respondent company, who said: —

"I owned the land personally before Ampang Estate owned it. The land has been in my and Ampang Estate's ownership for over 20 or 30 years.

Adjoining this land there is a mining ground — used for a long time. At the end of 1966 it was mined by Guan Soon. *There were other mining operations before.* Towards end of 1966, there was a cave-in at the *southern boundary of Ampang Estate.* There was no cave-in — not even during *mining operations by other mines.*"

From the mouth of the respondents' own director it was thus proved beyond any shadow of doubt that, *adjoining* the respondents' land, *at its southern boundary*, other miners had worked this mining land for a good many years. They could not have worked the land without excavating the hole in the ground, which was the condition of the land as these appellants found it when they entered into occupation. There was not an iota of proof that the appellants enlarged or deepened this hole, where it was closest to the cave-in, or that on the surface they had gone even a foot nearer the boundary than their predecessors. If the appellants were to be held responsible, purely on the ground that they were the people who had made the mine-hole, then I must say that they had been wrongly penalised for the acts of others. The case for the respondents, as presented to the learned trial judge, was that it was the appellants who excavated the hole. Had it been otherwise, why was it that the claim was founded solely and wholly on withdrawal of support? No act of negligence was pleaded, nor any breach of mining regulations, nor any act or default on their part to which the cave-in was attributable. The respondents must of course be bound by their pleadings. If the appellants did not themselves excavate the mine-hole, what acts had they been proved to have committed to be held liable for withdrawal of support from the respondents' land? On this point I would quote that eminent judge of the Australian High Court, Dixon J. (as he then was) who said in *Torette House Pty. Ltd.* v. *Berkman*[1] as follows: —

"An analogy may be found in the cases which deal with the withdrawal of support. If an owner of land make an excavation which ultimately leads to a subsidence of adjoining land, but he parts with the ownership and occupation of the excavated land before the disaster takes place, the new occupier and owner in whose time the subsidence occurs has been held to be under no liability to the adjoining owner or occupier. The reasoning upon which his freedom from responsibility is justified is explained in the following passage:- 'The rule acted on in these cases would seem to be acceptable in principle. It is true, indeed, as we have already seen, that where a continuing nuisance exists upon land, the occupier for the time being of that land is liable for the continuance of the injury, although the creation of it was due not to him but to his predecessor in title. It seems, however, that the case of interference with the right of support does not in truth fall within the same principle. There is here no continuing injury — no continuing duty running with the land to supply artificial support for the natural support which has been taken away by the act of a predecessor in title. The easement of support does not amount to a positive duty to support the dominant land; it only amounts to a negative duty not to interfere with the natural support possessed by that land. This negative duty is broken once for all by him who originally made the excavation, and he alone is and remains responsible for the consequences of his act whenever those consequences ensue' (*Salmond* on Torts, 9th ed. (1936) (Stallybrass, pp. 266, 267)."

In my judgment, common law principles apply to claims for disturbance of the right of support. The law on this subject was enunciated by Cockburn C.J. in *Lamb* v. *Walker*[2] as follows: —

"The fundamental principle on which the decision in *Backhouse* v. *Bonomi*[3] proceeds is, that no cause of action arises in respect of what a man does on his own land, until actual damage arises therefrom to the property of the adjoining owner. According to that decision there is no abstract right of support, independent of acquired easement, from adjacent strata, and the removal of such strata constitutes in itself no wrong. No wrong arises to *A.*, from the excavation of *B.*, on his own soil though the stability of *A.*'s adjoining land may be thereby endangered, unless and until *A.* sustains actual damage therefrom. And the reason is that the law does not recognise any right in *A.* to the support of the adjacent soil, otherwise than as involved in the larger proposition that he is entitled to the enjoyment of his own property undiminished and unaltered by any use which *B.* may make of his. *B.* may use his own property as he pleases, provided in so doing he does not do actual damage to his neighbour's property or diminish or disturb his neighbour's enjoyment of it."

It is thus clearly the law that when a subsidence occurs to a neighbour's land, he who causes the subsidence is liable in damages. But, in reported cases, as in this instance, it has often transpired that many a year might elapse between the excavation of land and the occurrence of the resulting subsidence and that during the interval a change has taken place in the ownership or occupation of the land where the excavation exists. In such event it has been held in *Greenwell* v. *Low Beechburn Coal Co.*[4] and *Hall* v. *Duke of Norfolk*[5] that the present occupier is under no liability. The principle is set out in the headnote in *Norfolk's* case as follows: —

"The owner of minerals is not liable for damage caused to neighbouring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession."

These cases were followed by the New Zealand Court of Appeal in *Byrne* v. *Judd.*[6] The judgments of their Lordships which I have read with the greatest interest, amply fortify me in my decision.

At this stage I would emphasise the necessity of the case being decided according to the pleadings. As Lord Radcliffe said in *Esso Petroleum Co. Ltd.* v. *Southport Corporation:*—[7]

"In my view, where the question is, as here, as to the sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped on argument."

The respondents set out to prove only what they considered to be the two essential facts: first, that the appellants carried on mining on the adjacent land and secondly, that "by reason of such working" the appellants had suffered damage to their property: see paragraphs 4 and 6 of the statement of claim.

Perusal of the evidence they adduced in support of their claim confirms that no attempt was made to prove that, *by reason of* the appellants' own mining operations, they — and not weather conditions in the passage of time affecting the slopes of the mine-hole left by their predecessors — were responsible for the cave-in. The respondents called ten witnesses. The first was *Mr. Tan Kim Bee,* Senior Inspector of Mines, whose evidence was entirely hearsay, as will be seen from the following passage: —

"The person dealing with this complaint was my deputy — Redzuan now stationed in Kuantan. *I had no personal knowledge* until recently when I was called as a witness. I studied the file and had a look at the place. When I say 'recently' I mean about two weeks ago. *My evidence is on the contents of the file.*"

I need hardly add that statements and minutes in the file made by officers of the Mines Department who were not called as witnesses cannot be read as evidence on the record to be taken into consideration.

The second witness was another Inspector of Mines, *Mr. Phun Kong Tet,* who produced another set of files K.L.U.1278. He took up his post on August 1, 1968 and there was nothing on the record to show that he had any personal knowledge of the appellants' mine prior to his appointment. The landslide occurred in December 1966, seventeen months earlier. What he was required to do was to produce minutes made by one Enche Ja'afar and a Mr. Chew — neither of whom was called as a witness — and a prohibition order dated May 17, 1967 which prohibited mining of *all* faces of the mine and not merely those adjacent to the respondents' property. He was not asked and did not give the reason for the prohibition. His testimony did, however, reveal that no prohibition orders of any sort had been issued before the landslide.

The third witness, *Mr. Menon,* after being affirmed, said he could not find the file from the Waterworks Department which he was required to produce and was thereupon released. The fourth witness was *Mr. Moorthy,* the Roads Engineer of the Kuala Lumpur Municipality, who naturally was unable to give any evidence about the appellants' mining operations, but testified about soil and drainage construction works on the respondents' housing estate. The fifth witness, *Mr. Chong Sun Yit,* was the Assistant Town Planner, Kuala Lumpur, who produced the site plan of the respondents' housing development.

The sixth witness, *Mr. Tan Toh Hock,* was an architect employed since 1967 to carry out development of the respondents' property. The only relevant evidence obtained from him was that the cave-in brought down about 100 feet of drain which fell into the mine-hole. He was asked: "Do you agree with the statement (made by Enche Redzuan in Ex. P4) that the slip was brought about by wet weather?" His answer was: "It is possible".

The seventh witness *Mr. Kandiah Cumarasivam,* a consulting engineer, was in his own words "engaged by Ampang Estate to supervise the collapsed drain and earth fillings adjoining the Guan Soon Mine". He made his first inspection of the site on April 3, 1967, wrote a report (Ex. P16) dated April 29, 1967 and a second report on February 15, 1968 (Ex. P17). He was unable to say what was the extent of the damage sustained in January 1967 or February 1967. His evidence was of no account whatsoever in sustaining the respondents' cause of action, except for hearsay.

The eighth witness, *Mr. Tan Toh Hua,* an accountant and company secretary, was called to prove the special damages, namely, payments made by the respondents on works done after the landslide. His

evidence, therefore, was irrelevant unless and until the appellants' liability had been established. The ninth witness was a photographer who took a number of photographs between January 18, 1967 and June 17, 1968 (which are in the appeal record) after the landslide.

The tenth and final witness was a venerable old lady, *Madam Loh Ah Moy*, who is a director of the respondent company. Part of her evidence has been quoted earlier in this judgment. Let me say at once that the integrity of this good lady has never been called in question, here or in the court below. The pleadings and the magnitude of the sum claimed by way of damages were matters which she naturally left to her professional advisers. She conceded, instantly and with the utmost candour, that a number of items in the claim were included by mistake. The learned trial judge did not refer to her evidence at all as relevant to the cause of action and I do not think that her testimony in any way helped to establish the appellants' liability for the subsidence.

I have set out above at some length the whole of the evidence of the respondents because, with the utmost respect, I am unable to agree with the trial judge's finding that "the subsidence was solely caused by the mining operations carried out by the defendants resulting thereby in the withdrawal of support of the plaintiffs' land". All the witnesses were called to establish damage, not its cause attributable to the appellants.

In order to succeed, a plaintiff must prove his case — even where the defence calls no evidence. Here, after all the evidence was produced on both sides, the closing submission of counsel for the respondents (which I have quoted in full earlier) had still to be based on three assumptions: (a) damage caused to the respondents' land by the slips, (b) that for these slips the appellants were to blame for having done one or the other of three things — working too close to the common boundary, steepness of the mine-face, emission of effluent from the mine into the respondents' drainage system, and (c) activities on the part of the respondents resulting in withdrawing from the appellants' lands "the *natural support previously enjoyed*".

The damage was never disputed. But, where was the evidence of the facts specifically alleged in paragraph (b)? If there was a total absence of any evidence supporting the allegations in paragraph (b), what were the *other* activities — which the statement of claim was unable to categorise — causing withdrawal of support? From the mere proof of damage alone, this case surely cannot be one of *res ipsa loquitur*. I have not overlooked a letter written by the appellants to the respondents' solicitors on February 6, 1967 referred to by counsel for the respondents who submitted that it contained a clear admission of liability.

The letter reads: —

"We have for acknowledgment your letter K/137/67/443 dated 2nd February, 1967 and to inform you that the damaged portion to the lands has been attended to according to the instructions of the Mines Department.

Piling at the slipped way and re-filling are now almost completed. The damaged drain will be restored to its original state as soon as the ground where re-filling had been done is fully set and firm.

We very much regret for the encroachment and the damage done to the property and we assure you that such occurrence will not be repeated."

I do not think this letter written by laymen having no knowledge of the law should be read as an unconditional admission binding on them regardless of their mistaken view of the law. If they were in error, their error cannot oblige the court to follow their view.

Turning to the case for the appellants, I think it was sufficient that all the allegations in the statement of claim were traversed in their defence. Once it was shewn that the mine-hole was an excavation made by their predecessors, the onus was on the respondents to prove what counsel appearing on their behalf conceded they had to establish in order to succeed. It cannot be assumed, without a shred of evidence, that the appellants enlarged or deepened the mine-hole, or that on the surface they had gone any nearer to the common boundary than their predecessors. It cannot be assumed, again without proof, that they worked the mine-face to a degree of steepness as to endanger the stability of the respondents' land. It cannot be assumed, without evidence, that the flow of effluent from the mine was the cause of the damage.

Had there been some evidence, however tenuous, on any of these three allegations relied on by the respondents, rebuttal might possibly have been necessary. Nevertheless the appellants did adduce evidence of two officers of the Mines Department who wholly exonerated the appellants of all responsibility. Mr. Chan Cheun Wah, a mining assistant, special grade, was in charge of the appellants' mine since early 1966 or the middle of that year until August 1969, when the mine closed down. He was not questioned about the steepness of the mine-face. According to him this particular portion of the mine was not being worked at all at the relevant time — thus corroborating the statement in Enche Redzuan's letter (Ex. P2) that "the damage was caused by a slip of ground on the mine-face which had been left unworked for some time". In Enche Redzuan's opinion the slip was brought about by wet weather. As regards the discharge of effluent from the mine Enche Redzuan, in his letter of October 28, 1966 (Ex. P2) wrote as follows: —

"It was found that the water that entered your clients' drains comes from a low-lying and swampy area — the flow being due to natural drainage trends. The mine's effluent also discharges into this swamp, which, by law, is allowed for as long as the solid content is within the required limit. There is nothing illegal about it."

Complaint about effluent had been made by the respondents on October 4, 1966 (Ex. P1) against these appellants as well as another mine, the Sincere Tin Mine of Hock Leong. Mr. Chan Cheun Wah's testimony on this subject was as follows: —

"I cannot say the quantity of water from the defendant's mine that goes into the swamp. I can roughly say it is about 500 gallons per minute for one hour or two at the most — three or four times a month. The other mine would be discharging about 3,000 gallons a minute daily. When I say 'the other mine' I refer to Sincere Tin Mine.

Diversion was done by Hock Leong a few days after the complaint. The diversion was southwards from the swamp. (P.1 shown to witness). Diversion was done on 1.11.66 —

according to Ja'afar's minute. After diversion it was not possible for water to reach plaintiff's land.'

In my view this effectively disposed of one suggested cause of the subsidence, for which responsibility had been attributed to the appellants. The discharge of effluent into the swamp had ceased almost two months before the slip.

I shall now conclude with the evidence of Enche Redzuan, Senior Inspector of Mines. In my opinion the material part of his evidence is this — that there was a mine-hole before the appellants began mining operations and that "if it were not for the mine-hole there would not have been a slip". In cross-examination, it is true that he said, "*In this particular case,* if the miner had not worked in that area, there would not have been a slip". But then, I think, he should have been, but was not asked, to give specific reasons which might have supported the assumptions made in Mr. Peddie's submission. That statement of opinion must therefore be read with what the witness said later in re-examination: "I am not absolutely certain what exactly caused the slip *in this case*". Thus Enche Redzuan's evidence in my view afforded no assistance in support of the respondents' case.

There is another aspect of this case in which, I think, the learned trial judge had been misdirected by the arguments and cases cited to him. He had been asked to disregard the construction of the drains as in any way affecting the respondents' land in its natural state, because the drains could not have added any appreciable weight to the property to the extent of causing the subsidence. In my view, there was on the evidence clearly another possibility that the land was not left in its natural state — within the meaning of section 44(1)(b) of the National Land Code — if the digging of trenches and faulty construction of drains by the respondents facilitated the seepage of water so as to cause erosion. It was not the *weight* of concrete that mattered, but *how close* the drains were to the edge of the mine-hole. On this point there was unfortunately no evidence; but, unless the distance between drain and mine-hole was safe enough, the evidence of Mr. Moorthy, the Municipal Road Engineer, might well have to be taken into account. According to him the affected portion of the respondents' land north of the mine was low and "the soil in this area very sandy". The trenches dug for laying the drains of the size shown in the photographs must have been fairly wide and deep. The construction also appeared not up to required standards. Mr. Moorthy's relevant evidence reads: —

"A big drain is the main outlet from the whole scheme.... There is an existing earth drain. The plan shows a proposed concrete drain. *If constructed* it would be adequate to take water from the scheme. According to our inspection, part of this drain has been constructed. The eastern side to the middle has been constructed, *but not to our requirement.* The concrete inverts had been laid. *The rubble sides to the drain had not been laid.* According to the records, the inverts were put in as far back as June 1964, but *rubble pitchings had not been* constructed.... There is a mining hole. It is *quite close* to the earth track. The inverts are sunk three to five feet below ground level. *The main purpose of the rubble pitchings is because of the sandy sides....* The drain at the southern boundary has been *eroded.... If soil underneath the drain collapsed, the whole drain would collapse, whether there was a base or not.*"

In my view, if the respondents' land were to be regarded as in its natural state, as pleaded, it was the duty of the respondents to adduce evidence that their drains were not so perilously close to the edge of the mine-hole that the erosion deposed to by Mr. Moorthy could have had any effect on the stability of the soil. By reason of the unfortunate omission, the question whether the respondents' land might properly be regarded as in its natural state is one to which, I am afraid, this court is unable to give any confident answer.

For the reasons above set out at considerable length, I am of opinion that this appeal should be allowed with costs, both here and in the court below.

I would add, in closing, a few remarks about the claim to approximately half-a-million dollars in damages. At the trial no attempt whatsoever was made to substantiate two of the largest items, namely, for $373,483.44 and $100,000 set out in the statement of claim. Furthermore, it was admitted that $15,136 (not a small sum) was wrongly charged. In effect then the action opened with a claim for only $88,533.25 — the overcharge being in excess of $400,000. The trial judge gave judgment for $47,928.65.

From approximately 150 feet of drain, a total of $2,396 was charged for shovelling out silt — which I consider hardly reasonable, at $16 per foot. Deducting the $800 allowed for earthworks, the net result was that the respondents were awarded $43,932.65 solely for the construction and repairs of drains. In fact the estimated total cost of repairs set out in the statement of claim was barely $27,000. I do not think those 24-inch concrete drains could have cost as much as $300 per foot length — taking the length of the drain destroyed to be 150 feet overall. All the figures appearing in Exhibit "A" were compiled by Mr. Tan Toh Hua, the respondents' secretary, entirely on hearsay. I do not think that section 34 of the Evidence Ordinance renders hearsay evidence admissible as proof merely because Mr. Tan brought the company's books of account into court for examination by counsel for the appellants (if he chose to do so) and he failed to avail himself of the opportunity. The appellants never agreed to dispense with formal and proper proof of the construction cost of the drains nor was it ever suggested that the company secretary had any personal knowledge of what the vouchers submitted to him were for. The respondents having claimed $500,000 were awarded less than 1/10th. They failed to prove any item of the special damages claimed. Even had they succeeded in the action, I do not think that, on the evidence, they would have been entitled to any sum in excess of $10,000 by way of general damages. As their claim was grossly inflated by as much as 50 times $10,000 it would in the event have been a proper exercise of the court's discretion to have denied them their costs of the action: see *Gray* v. *Lord Ashburton.*[8]

Gill and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *Joseph & Son; Skrine & Co.*